



20 Vesey Street, Suite 1200
New York, NY 10007
212-967-8300

April 18, 2019

VIA E-MAIL

Boston College
Office of the Dean of Students
Maloney Hall, Suite 448
140 Commonwealth Avenue
Chestnut Hill, MA 02467-3859

Re: Title IX Investigation involving [REDACTED] and [REDACTED]

Dear Dean O'Driscoll and Ms. Davis,

On January 23, 2018, [REDACTED] received a letter advising him that he allegedly violated Boston College's Sexual Misconduct Policy (the Code) 80 days earlier. The letter detailed, "(s)pecifically, it is alleged that into the early morning hours of November 4, 2018 in your residence hall room in [REDACTED], you sexually assaulted [REDACTED], [REDACTED] by engaging in non-consensual sexual contact through kissing and touching of intimate body parts and penetrating her vagina with your penis without her consent while [REDACTED] was incapacitated." The letter also advised [REDACTED] of a second allegation related to an earlier encounter at [REDACTED]. The only description of this offense was that the encounter was a "non-consensual touching." Neither charge is true and the investigation did not reveal any credible evidence necessary to support a finding of responsibility. In fact, the opposite is true, the evidence contained in the Evidence Binder underscores that not only did [REDACTED] not lack capacity to engage in a consensual sexual encounter, she was an active participant in the sexual encounter.

"NON-CONSENSUAL TOUCHING" AT [REDACTED]

[REDACTED] is charged with a "non-consensual touching" at [REDACTED]. The Code defines Sexual Contact as including

"intentional contact with the intimate parts of another person, causing another person to touch one's intimate parts, or disrobing or exposure of another person without permission. Intimate parts may include the breast, genitals, buttocks, groin, mouth, or any other part of the body that is touched in a sexual manner. Sexual contact includes kissing and attempted sexual penetration."

In her first interview, [REDACTED] states that she "remembered that [REDACTED] put his arm around her waist and pulled her close to him." This interaction is later described in the

summary as [REDACTED] “hugging her to him.” In the second interview, [REDACTED] states [REDACTED], “pulled her towards him by the waist, in a hug, as they stood in line.” Presumably, this charge (incapacitation is not referenced in the January 23 letter as to this charge) is a Code violation because [REDACTED] allegedly, unsolicited, did the above-described conduct.

This charge is unsupported by the evidence. First, based on [REDACTED] narrative alone, one is hard pressed to deem her “waist” an “intimate part” or, for that matter, that he touched her waist in a “sexual manner.” Her testimony is that in [REDACTED], standing among other students and Boston College staff, an acquaintance pulled her close to him by the waist. That is the extent of the conduct. In light of the innocuous nature of this conduct, it is no wonder why [REDACTED], while he does not dispute that the two could have hugged, has no memory of this exchange.

Second, the relationship between the parties and the location of the encounter is relevant when determining whether a particular physical touching warrants an adverse Title IX finding. Context matters. For instance, if a complete stranger (or even an acquaintance) pulled a complainant towards him by the waist in an empty dark room when the complainant was retrieving her coat at the end of a house party one could possibly understand the charge. Here you have two acquaintances greeting each other on a line in a well-lit Boston College facility with other students and staff around. Additionally, in her second interview, [REDACTED] concedes that at the time of this touching it was “hard” to say whether or not “[REDACTED] was flirting with her or she was with him.” Further, not only did she admit she was generally “flirty” but continued that she was a “nice person and therefore would not ignore someone she knew (or for that matter ‘other people she does not know well’)” while standing on line.

Third, the Evidence Binder has several examples of similarly innocent interactions between [REDACTED] and individuals at the [REDACTED] itself as well as one with [REDACTED] from weeks earlier. For example, [REDACTED] references seeing [REDACTED] at the beginning of her [REDACTED] year at a party. The two said hello and [REDACTED] “gave her a hug.” Was that unwanted? Was that a violation of the Code? For that matter, on the night in question, [REDACTED] approached [REDACTED] and hugged him. [REDACTED] noted that she was “outgoing” and “touchy” that night. [REDACTED] told the Investigative team that [REDACTED] was acting “uncharacteristically flirtatious” while at the [REDACTED]. In [REDACTED] second interview she provided additional information about her interactions with [REDACTED]: she touched his “leg at the party.” Further, she “explained this was something she had “done in the past to people when [she] was drunk.” She labelled such conduct a “harmless and playful” gesture. Similarly, [REDACTED] said in her second interview that she “could have made a flirty move” towards [REDACTED] when they were at a party earlier in the year, at which she was intoxicated.

In light of the allegation related to the [REDACTED] interaction, all of [REDACTED] above-described conduct could be recast as Title IX violations. That, of course, would be unreasonable. All of these incidents are commonplace interactions between people who know one another. None could be considered untoward or inappropriate. Similarly, the touching in [REDACTED] cannot possibly be the type of problematic conduct envisioned by

the Code. If [REDACTED] deems her own similar conduct as “harmless and playful,” one cannot then label similarly innocuous conduct by [REDACTED] as a Code violation.¹

[REDACTED] WAS NOT INCAPACITATED ON NOVEMBER 4, 2018

The Code states that “incapacitation is the inability to make informed, rational judgments and decisions.” The University’s determination of whether [REDACTED] “knew, or reasonably should have known under the circumstances, whether [REDACTED] was incapacitated” will be based on the perspective of a reasonable person in [REDACTED] position. First, [REDACTED] was not, in fact, incapacitated that evening. Further, (and not surprisingly as she was not incapacitated), no reasonable person in [REDACTED] position (or the six other people who interacted with her immediately before and after her interaction with [REDACTED]) would have known, or reasonably should have known, that she was incapacitated. A full review of the Evidence Binder—the documentary evidence as well as witness accounts—make this conclusion irrefutable.

Although, there are a number of witnesses and evidence that both individually and collectively reveal [REDACTED] was not incapacitated, it is [REDACTED] roommate, [REDACTED], who provides some of the most compelling evidence that [REDACTED] was not incapacitated. [REDACTED] is critically important because 1) she interacted with [REDACTED] proximate in time to [REDACTED] interactions with [REDACTED],² 2) [REDACTED] was completely sober, and 3) [REDACTED] is a roommate and a particularly close friend of [REDACTED], whose loyalty clearly lies with [REDACTED].

[REDACTED] description of [REDACTED] when she and [REDACTED] returned from the [REDACTED] irrefutably shows that [REDACTED] was perfectly able to make informed, rational judgments and decisions (or, again, at a minimum, no reasonable person would have believed based on [REDACTED] actions that she was incapacitated). [REDACTED] makes clear that, despite whatever alcohol [REDACTED] had consumed, she was perfectly able to shift to “[REDACTED] mode” and assist [REDACTED] in any number of personal tasks. Further, upon [REDACTED] return to the apartment, [REDACTED] determined she needed assistance in order to help [REDACTED] and decided to solicit the aid of [REDACTED]. Recognizing the hour of the day, [REDACTED] “knocked lightly” at the door to determine if [REDACTED] was awake.³ [REDACTED] states that they “got [REDACTED],” “taken

¹ It is worth noting that [REDACTED] failure to remember this hug speaks volumes as to his credibility. His own friend, [REDACTED], recalls it was [REDACTED] who initiated this hug. [REDACTED] simply does not recall the interaction and candidly said so. Although, he easily could have adopted [REDACTED] memory as his own or simply claimed that she hugged him first (which would have been entirely consistent with the way [REDACTED] was acting that evening) he did not. He has been a credible and truthful witness throughout this process.

² [REDACTED] spent time with [REDACTED] within 30 minutes of meeting [REDACTED] at [REDACTED] (and within an hour of the sexual encounter). There is a photograph in exhibit 25 of a photo of [REDACTED] and [REDACTED] at 1:15 a.m. and [REDACTED] purchased the food at 1:42 a.m. Obviously, [REDACTED] remained with [REDACTED] for some amount of time after the photograph was taken and [REDACTED] saw [REDACTED] at least several minutes before purchasing the food.

³ These facts also call into question [REDACTED] claim that she does not remember much of her interactions from that evening. Her memory of recruiting [REDACTED] to assist with [REDACTED] was provably intact because the next day, during a text exchange with [REDACTED], she apologized for waking [REDACTED] up and then when [REDACTED] reminds [REDACTED] that she was already awake, [REDACTED] notes, “you were close to sleeping tho.”

care of” in the room.” She later provides more details stated that they “changed [REDACTED] into pajamas and put her to bed.”

The Snapchat Video taken by [REDACTED], discussed further below, reveals that [REDACTED] was completely naked when she was brought into the bathroom. There can be no question that [REDACTED] (again in “[REDACTED] [REDACTED] mode”) made the logical decision to undress [REDACTED] before taking her into the bathroom, then assisted her in the bathroom when she was sick, dressed her in Pajamas, and put her in bed. [REDACTED] also had the idea to memorialize the situation in the bathroom with a Snapchat Video. She had no coordination issues using her phone and attempted to create a humorous video posing behind [REDACTED] with a face of mock disgust. Based upon the totality of the circumstances of her care of her roommate, her interactions with [REDACTED], and the subsequent “joke video” reveals an individual who is quite capable of assessing not only her situation but the situation of those around her.

One of the hallmarks of incapacitation, as noted in the Code is “the inability to perform personal tasks.” In fact, the example of one such personal task referenced in the Code is “undressing.” In this case, [REDACTED] not only had the ability to perform such tasks but also assisted her friend who appeared to be incapable of undressing herself. [REDACTED] interactions with [REDACTED], as described by [REDACTED], make it clear [REDACTED] did not have an “unsteady gait” or “impaired coordination” (two other examples listed by the Code as potential signs of incapacitation).

This portion of the evening is especially compelling because [REDACTED] account, and the Snapchat Video, provide the type of evidentiary basis for a finding of [REDACTED] incapacitation in a Title IX proceeding if the evidence was that, around the time of the Snapchat Video, [REDACTED] had had a sexual encounter with another student. Ironically, in this case, not only is there no such similar evidence of [REDACTED] intoxication, but there is compelling evidence to the contrary. It is quite clear in this matter that [REDACTED] is, in fact, the person lending support to a potentially incapacitated individual. One is hard pressed to find more compelling evidence that [REDACTED] was not incapacitated at the time of her encounter with [REDACTED] than her interactions with [REDACTED] upon their return to the apartment.

[REDACTED] does make conclusory statements that “[REDACTED] was also clearly drunk” but, to her credit, she does not embellish and provide any additional facts to support this conclusion. In fact, her statement makes clear that [REDACTED] did not act in any remarkable way and [REDACTED] concedes that her conclusion that [REDACTED] was “drunk” was not based on any objective indicia of intoxication. For instance, [REDACTED] believes [REDACTED] and [REDACTED] to have the same tolerance for alcohol and, since [REDACTED] and [REDACTED] allegedly drank the same amount, [REDACTED], therefore, must also have been drunk.

Further, [REDACTED] makes clear that, only after [REDACTED] took care of [REDACTED] and was speaking to [REDACTED], did [REDACTED] become “aware that [REDACTED] was also drunk.” However, when asked to articulate the basis of that opinion, [REDACTED] references some subtle difference in her speech other than slurring. This is worth noting because the Code lists slurred speech as one warning sign of possible incapacitation, but [REDACTED] makes clear [REDACTED] was not slurring (nor does she usually slur—or stumble—when she has been drinking).

When [REDACTED] level of intoxication was again revisited by the investigative team in an effort to identify any possible objective indicia of intoxication, [REDACTED] offers nothing and simply restates that her voice sounded “different” and that the way she walked was not how she “normally” walked although [REDACTED] makes clear she was “not falling over.” These are both extraordinarily subtle differences that only a close friend of [REDACTED] could possibly be aware of. No factfinder could conclude a reasonable person would have possibly noticed either of these two characteristics at all (assuming [REDACTED] actually noted these two characteristics). Regardless, neither would be perceived as a sign of intoxication let alone incapacitation. In light of these observations, [REDACTED] candidly conceded that [REDACTED] was “functional” within an hour of her interactions with [REDACTED]. Based on [REDACTED] statement alone any allegation that [REDACTED] was incapacitated must fail. Couple this with [REDACTED] own actions of caring for her friend and her ability to take a video as a joke, the argument of incapacitation fails without any the need of other witnesses.

[REDACTED], [REDACTED], [REDACTED], AND [REDACTED]

[REDACTED] interacted with a number of [REDACTED] friends before the sexual encounter. Further, [REDACTED], also had an opportunity to observe [REDACTED] after she left the room. Each makes quite clear, that [REDACTED] neither did nor said anything that would have led them to believe she was incapacitated.

[REDACTED] states it was [REDACTED] who initiated the contact with [REDACTED]. He recalls it was [REDACTED] who approached [REDACTED] at [REDACTED] and the two hugged. [REDACTED] further stated that since he was not on a meal plan, in the presence of [REDACTED] he asked [REDACTED] to buy his food. He noted that [REDACTED] intervened and offered to buy their food for them. [REDACTED] credibly noted that [REDACTED] attendees are likely to have “some level of intoxication” but he observed no indication that [REDACTED] was drunk. Further, [REDACTED] recalled [REDACTED] and [REDACTED] seemed attracted to each other in that the two appeared focused on one another as opposed to the others when in the common suite.

[REDACTED] also notes that [REDACTED] did not appear intoxicated. He relates that she was perfectly able to walk straight, had no issues standing, and seemed to be engaged in a conversation with [REDACTED]. He also states he had an opportunity to see [REDACTED] get off the couch with [REDACTED] and walk with him to his room, thereby corroborating her interest in [REDACTED] as well the fact she did not remotely appear incapacitated.

[REDACTED] also makes it clear that [REDACTED] did not appear intoxicated in their interactions. He describes her speaking clearly, not slurring her words, and having no issue walking from [REDACTED] to the suite. Further, when in the common room of the suite, he recalls everyone speaking together as well as [REDACTED] and [REDACTED] speaking directly to one another and that [REDACTED] displayed no signs of intoxication.

[REDACTED] is an important piece of the investigation as his statement undercuts [REDACTED] claim that she was crying in the room.⁵ [REDACTED] makes clear that she walked out of

⁴ The investigative team appropriately inquired of each witness whether or not he had spoken to anyone about this matter and each truthfully recounted that he had spoken with me. Nonetheless, the record should be clear that although [REDACTED] father (also an attorney) contacted me because he was concerned a complaint would be filed. I did not meet with or speak to [REDACTED] until sometime after his conversation with [REDACTED] at [REDACTED].

room, [REDACTED] had a brief exchange with her, and she left. He observes no sign that she was upset or had been crying and there was nothing in her movements that suggested she was intoxicated. He notes that she appeared “fine.” [REDACTED] description of the manner she left the suite is simply inaccurate.

[REDACTED] also observes [REDACTED] after she had sex with [REDACTED] during a five to ten-minute conversation directly outside of [REDACTED] suite. [REDACTED] notes that because [REDACTED] was crying, he could not identify any particular conduct on [REDACTED] part that he could attribute to alcohol intake as opposed to emotion. Importantly, however, he did note that he felt it unnecessary to escort her to her dorm room in a separate building “because he did not think she was so intoxicated that she needed assistance to get back.”

[REDACTED] (somewhat noncommittedly) states she was “intoxicated, I guess.” However, [REDACTED] makes clear that he did not see her actually drink anything and his conversations with her were “regular.” He did not see her “stumbling around” and would put her level of intoxication at only a 5 or 6. Further, [REDACTED] offers not a single fact to support why he would assign that number to her.

There has been much commentary about a pizza stain on [REDACTED] [REDACTED]. Her narrative describes her “fumbling” the pizza but not even dropping it on the floor. Of course, no one else has a memory of this occurring and [REDACTED] has no memory of whether this “fumble” even happened in front of [REDACTED] or his friends. It is just as likely it happened when she first got her food and before she even saw [REDACTED] and his friends at [REDACTED].

Regardless, what is more relevant is that [REDACTED] wanted to get food, went to [REDACTED], recognized [REDACTED], offered to buy him and his friend food, and was perfectly capable of providing her card to the cashier and making the purchase. It seems that, at a minimum, she interacted with the cashier at [REDACTED] without causing anyone any alarm. One would assume that an individual associated with BC, or employed directly by BC, would recognize an individual who was truly incapacitated and take some action. There can be no meaningful dispute that [REDACTED] would not have been capable of performing such tasks. [REDACTED] ability to do so underscores [REDACTED] conclusion that [REDACTED] was “functional.”

ATTENDEES AT THE [REDACTED]

[REDACTED] notes that [REDACTED] didn’t appear to be “totally intoxicated,” but seemed to “feel the buzz” and a “little bit of dizziness.” [REDACTED] did not see her fall while at the party and

⁵ [REDACTED] testimony makes it crystal clear that either [REDACTED] is embellishing her account or misremembering her demeanor when she left [REDACTED] room. It is clear she was crying and emotional when interacting with [REDACTED]. It is equally clear that she was not crying or outwardly upset when interacting with [REDACTED] in his room or immediately upon exiting his room and apartment.

notes that she was capable of dancing “sexually” in that she was “grinding” and “twerking.” The only objective evidence of any drunkenness he references in his statement is that she did not walk in a straight line and “bumped into her friend” when he saw her walking away. This description, in and of itself, is very limited as to what it describes, and any issues it raises is quickly resolved by [REDACTED] narrative and the other evidence discussed throughout this submission.

Further, as far as [REDACTED] dancing at the party, [REDACTED], herself, makes it clear (despite her claim that her motor skills were “not great”) she was quite coordinated. She recalls, “repeatedly” “dropping it low” when she was dancing. Nonetheless, she notes that despite being in this more challenging physical position repeatedly she only fell once. Additionally, although she notes that she was “really drunk” at the [REDACTED] she also relates that she asked another student to “hold her phone because she did not want to lose it and had no pockets.” This request is important because it is a small, yet revealing, example of the fact that, despite her conclusory self-assessment that she was “really drunk,” she was making rational decisions as it related to her property.

[REDACTED] broadly concludes that everyone at the party was intoxicated but explains that “no one seemed to be at a level of ‘concern.’” [REDACTED] concludes that he would rate [REDACTED] as a 5 or 6. It is unclear why he assigned this number to [REDACTED], as he offers not a single fact that would reveal she had been drinking and he specifically notes he did not see her stumble or fall.

[REDACTED] ranks [REDACTED] as a 7 or 8 and states she was “definitely intoxicated.” However, when explaining that conclusion, the only “red flag” to [REDACTED] was that [REDACTED] was more “outgoing” and that she was “touchy.”⁶ Neither of these descriptions, on their face, would indicate to anyone but [REDACTED] closest friends that she had been drinking. No reasonable person would perceive the behavior described by [REDACTED] as problematic or remotely indicative of an incapacitated state.

[REDACTED] paints [REDACTED] as heavily intoxicated. Somewhat tellingly, he proactively notes his concern that his “opinion might be labeled ‘biased’” because of his relationship with [REDACTED]. [REDACTED] statement might also be labelled biased because he was the only one of 18 witnesses who felt obligated to offer his opinion on the core issue in the case: he claims [REDACTED] was “beyond the point of being able to give consent.”⁷ Fortunately, [REDACTED] statement is so at odds with the other testimony it is rendered meaningless.

**[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]
[REDACTED], all interacted with [REDACTED] in the immediate time period**

⁶ As noted above, [REDACTED] said that [REDACTED] gave him a hug but what he describes as “outgoing and touchy” clearly extends beyond the initial hug he describes. In light of the two distinct charges levied against [REDACTED], it would have been worthwhile to explore in more detail why [REDACTED] said [REDACTED] was “touchy.” Whom did [REDACTED] see her touch? Where did [REDACTED] touch these people?

⁷ [REDACTED] also referred the investigators to [REDACTED] who, according to [REDACTED], was seated “on the couch next to the door where [REDACTED] was dancing and fell.” [REDACTED] was actually at an event at [REDACTED] that evening and was not even present. In addition to being “biased” it also seems as [REDACTED] is factually inaccurate.

surrounding the sexual encounter between [REDACTED] and [REDACTED]; both before the encounter ([REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]) and immediately after the encounter ([REDACTED] and [REDACTED]). Not a single one of these witnesses have articulated any objective fact that would have prompted a reasonable person to have known (or should have known), under the circumstances, that [REDACTED] was incapacitated. These six people utterly corroborate [REDACTED] impression that [REDACTED] was not incapacitated, one of whom, [REDACTED], is [REDACTED] close friend. Of course, these six narratives are separate and apart from [REDACTED] narrative and [REDACTED] own concessions.

[REDACTED] PRESENTED AS AN ACTIVE AND WILLING PARTICIPANT IN A PURELY CONSENSUAL SEXUAL ENCOUNTER

The evidence that [REDACTED] presented as an active and willing participant during her sexual encounter with [REDACTED] comes from a number of sources: her multiple statements throughout the course of the investigation to the investigative team, her comments and texts to friends and acquaintances about the encounter, and, of course [REDACTED] testimony. Although, [REDACTED] was charged under a theory of incapacitation these facts are all relevant because if [REDACTED], by word or deed, consented to the sexual encounter, such consent is compelling evidence that she was not incapacitated.

[REDACTED] various (and often evolving) statements as to what happened between she and [REDACTED] speaks clearly that she consented to this encounter. It is worth noting that the charging decision at the outset, again lack of consent due to incapacitation, reveals that her memory as to what unfolded between she and [REDACTED] was not one that someone could have any confidence in (i.e. it was “fuzzy” and “spotty.”) However, the investigation revealed compelling evidence in text messages and in [REDACTED] own (and again, evolving) narrative that she actually remembered many facts that spoke to a consensual encounter. Further, the other evidence and her subsequent significant shifts in her narrative reveals that many of these omissions seem calculated and underscores how flawed the case against [REDACTED] actually is.

In her first interview with investigators, [REDACTED] does not admit to any consensual interactions between herself and [REDACTED]. She is simply present in his room with no understanding of how she got there. For instance, she alleges 1) “[REDACTED] started to kiss her,” 2) “[REDACTED] started kissing her again and she was leaning back on the bed,” 3) “[REDACTED] knelt on the bed, sort of “over [her]” and pulled her shorts off,” 4) “He kissed her neck,” 5) “[REDACTED] “kissed [REDACTED] again and reached to pull her underwear off,” And 6) “[REDACTED] being on the bed, kneeling and pulling her spandex shorts off.”

There is never a concession, in this first interview, that she was a willing participant in any aspect of this sexual encounter, either that the kissing was mutual or that she facilitated the sexual interaction in any manner. Further, and one of the most critical facts in the investigation, during her January 14, 2019 interview, the only reference to a condom is her claim that she did not know if [REDACTED] used one. In light of this narrative, [REDACTED] was charged with having a nonconsensual sexual encounter with [REDACTED] when she was “incapacitated.” Every aspect of this encounter was listed as

nonconsensual: the kissing, the touching of intimate body parts, and the vaginal penetration.

It is worth noting that even in this first interview, ██████ concedes that ██████ stopped the encounter when asked. Of course, her ability to instruct ██████ to “stop” having sex with her reflects the fact that, whatever amount of alcohol she had, she was still able to make an informed decision and, by her own accounting, tell ██████ at this point she wanted the encounter to end; he complied. I know of no other case alleging an incapacitation theory that includes a complainant asking the respondent to end a sexual encounter followed by the respondent, in fact, respecting that decision. How can one be accused of taking advantage of someone who is unable to make informed decisions when this person, in the midst of the encounter, makes the decision to end the encounter?

This first interview, (10 weeks after the encounter and after seemingly countless conversations about the incident between ██████, her friends, and BC staff) is, objectively, not a candid recounting of the encounter. Her second interview is, in many important ways a recantation of the majority of the allegations from the first interview, and her statements and texts to others, many of which occurred before this January 14 interview, undercut her claims that formed the basis of the charges in the first instance.

In her second interview on March 1, ██████ offers concrete additional facts that either speak to the consensual nature of the encounter or concede the likelihood of other facts that confirm ██████ narrative as to the consensual nature of the interactions.

First, in the second interview, ██████ concedes to the investigative team that she was “making out” with ██████, in stark contrast to her lack of any participation that she had testified to in her first interview. Further, the Evidence Binder makes clear that ██████ used this exact phrase to both ██████ and ██████ the same day of her encounter (that morning) with ██████. ██████ did not want to admit this critical fact to the investigative team in the first interview, although it is obvious from the texts to ██████ and ██████ she clearly remembered her interaction in a fundamentally different way than she articulated to the investigative team at that time. This is relevant, of course, not simply to exonerate ██████ but also when more broadly assessing her credibility.

Second, when confronted with ██████ clear memory that she instructed him to kiss her neck, ██████ conceded that this fact was “probably true” as “she has said this before in consensual situations.” This fact further corroborates ██████ assertion that ██████ was instructing him what to do at various points in the encounter. During her second interview, ██████ also conceded that, as ██████ had described, she thought she “did lift up her back so that he could pull her shorts off.” She further “acknowledged that she did not think she objected to taking the spandex off.” This participatory action is an unambiguous, objective sign that any reasonable person would believe indicated a willingness for the sexual encounter to escalate. ██████ alleges that she has no memory of what she was thinking or feeling but whether that is true or not is irrelevant: her assisting with the removal of her shorts is a clear sign that she is consenting to the continuing sexual encounter. Moreover, this later concession further illustrates differences to her initial claim whereby she stated that “he pulled her shorts off.”

Third, ██████ makes it clear that ██████ asked him to get a condom and ██████ unequivocally corroborates this fact in her second interview. In her first interview, ██████ recounts a conversation that she had with ██████ at ██████ that leaves open the possibility

that she asked [REDACTED] if he had a condom: she does not refute [REDACTED] statement that she asked him to get a condom but instead asks him, “But did I ask you to use a condom?” She is even more candid in her second interview when discussing the condom issue. When asked whether she recalled any conversation about a condom, [REDACTED] stated that she vaguely remembered some conversation about condoms but could not recall what was said. She stated that [REDACTED] told her that she had asked him very clearly about a condom (but not ordered or instructed him to get a condom); she told him that she did not remember having done this “at all.” Nonetheless, she conceded that she simply did not know if she asked [REDACTED] for a condom and commented that that part was “all fuzzy.”

[REDACTED] STATEMENTS ABOUT THE UNDERWEAR

[REDACTED] also stated that [REDACTED] began to take her underwear off and she said, “No you don’t get to take my underwear off.” She stated in her interviews that this exchange reflects the fact that she did not want to have sex with [REDACTED]. However, she concedes that she did not specifically indicate that she did not want to have sex with him (which she does minutes later and he complies). In light of everything she had done at that point (for instance, helped [REDACTED] with the removal of her shorts and discussed getting a condom with him) no reasonable person would believe that the full removal of her underwear spoke to a lack of a desire to have sex. In fact, she conceded that she kept her [REDACTED] on because “she was somewhat self-conscious.”⁸ This is exactly what [REDACTED] reasonably concluded when she said this (and the fact that she pulled her underwear to the side). [REDACTED] states that she has no memory of the actual penetration and cannot state one way or the other how her underwear was moved to the side to allow the penetration. She “stated that he must have just pushed the thong to the side in order to do this.” She concedes this is only an assumption. In such a serious matter, any finder of fact cannot rely on such assumptions.

Importantly, in this case there are many reasons not to rely on her assumptions and recollections on this point. Although [REDACTED] claims not to remember pulling the underwear to the side, her assertion cannot give the investigative team any confidence because she does not remember many things from that night that demonstratively happened. [REDACTED] claims not to remember taking the photo at the [REDACTED]. It happened. [REDACTED] claims not to remember taking the photograph in the bathroom at the party. It happened. [REDACTED] claims not to remember guarding the door at the [REDACTED]. It happened. [REDACTED] claims not to remember [REDACTED] ordering an Uber or the ride from the [REDACTED] to her dorm. It happened. [REDACTED] claims to have no memory of taking the Snapchat video in the bathroom with [REDACTED]. It happened. [REDACTED] claims to have no memory of putting [REDACTED] to bed at night. It happened. [REDACTED] claims to have no memory of walking from her dorm to [REDACTED]. It happened. She has no memory of going to [REDACTED], no memory of the text exchange with [REDACTED], no memory of who might have been with [REDACTED] and, if anyone, what they looked like. She has no memory of walking from [REDACTED] to [REDACTED] room, no memory of hanging out in the common area of the suite, and no memory of walking to [REDACTED] room. Of course, as to

⁸ The fact, discussed below, that she pulled her underwear to the side eliminates this as any issue whatsoever.

critical parts of the sexual encounter (including the moment after she told [REDACTED] not to remove her underwear) are “spotty” and “fuzzy.” In any proceeding there has to be quality, credible evidence. None exist in this matter. Whether these lapses in memory are a truthful account or an unwillingness to share additional facts she deems to be embarrassing is irrelevant. There is no compelling narrative that can support a claim of incapacitation or lack of consent.

ALLEGED SNAPCHAT MESSAGE

[REDACTED] alleges that [REDACTED] sent a Snapchat message claiming that he and [REDACTED] were both “very drunk.” [REDACTED] never sent such a message. First, [REDACTED] is [REDACTED]. The Evidence Binder makes it clear that [REDACTED], earlier in the evening, drank some wine with his friends and was not impaired. The Uber receipts reveal he left for Boston at 11:10 pm and arrived in the city at 11:33 pm. Further, after not going to either of the bars he and his friends considered patronizing, they left Boston at 12:06 am and returned to Chestnut Hill at 12:31 am. [REDACTED] then left for the off-campus party at 12:49 am and arrived there at 12:54 am. [REDACTED], and other witnesses said he did not drink at the party. Finally, he was in an Uber to return home by 1:29 am. There is no dispute he did not drink upon the return to the common area after getting food at [REDACTED].

It is simply implausible that he would have texted [REDACTED] that, “I know we were both very drunk and I wish last night didn’t happen, but you don’t have to be an ass to me about it.” It is clear he was not drunk and he has consistently related that fact that to his friends and the investigators. The idea he would send a Snapchat message to [REDACTED] stating he and she were “very drunk” is simply inconsistent with all of the other evidence. It did not happen.

It is equally implausible that [REDACTED], who stated she believed that she thought this message might be “important” would delete this message after making the effort to save it and initiating this entire process. All the compelling evidence in this case reveals no reasonable person in [REDACTED] position would have known, or reasonably should have known, that she was incapacitated. It strains credulity that he would Snapchat a message saying the opposite (and then that same (“important”) message would accidentally be deleted).

TEXT MESSAGE EXCHANGE BETWEEN [REDACTED] AND [REDACTED]

The text message exchange between [REDACTED] and [REDACTED] the morning after her sexual encounter with [REDACTED] is dispositive on the issue of consent. It also should give the investigative team further pause as to the truthfulness of [REDACTED] narrative.

In the relevant portions (with the individual text messages separated by “/”) [REDACTED] writes:

[REDACTED] took me back to his room/don’t tell anyone this please/I don’t want anyone to know/We made out/And then he kept trying to take my pants off/Or thong at least...because he started to have sex with me/And I kept being like wait/Wait wait/And then he started too/And it was fine/But I was so upset because I didn’t really wanna/And it was fine/But I was so upset because I didn’t really wanna/And he stopped when I said stop/And he was like something wrong

some things wrong/And I was like panicked and crying/And I don't remember leaving

She adds, "I was just so upset that I let myself have that happen." She then clarifies that she "let [REDACTED] fucking [REDACTED] fuck meeee" and further (and unequivocally makes clear that when she said stop he did and most importantly, **"I just like let him start/Like he didn't know..I didn't want it at all/idk/I'm just mad."**)⁹ This text exchange began on November 4, 2018, hours after the incident.

From the witness summary, it appears that [REDACTED] was not asked about one of the most relevant concessions in that text exchange: she conceded to [REDACTED] (the same morning as the encounter) that the two began to have consensual sex and 1) "he stopped when [she] said stop" and, 2) "I just like let him/start/Like he didn't know... I didn't want it at all/idk/I'm just mad." This is what [REDACTED] explains happened: they began to have sex and there came a time that [REDACTED] indicated that she did not want to have sex anymore (because her back hurt) and he respected that request. Putting aside all the other evidence in this case, this text *from* [REDACTED] reveals that the charges against [REDACTED] must result in a finding that he is not responsible. **Far from being incapacitated, [REDACTED] did not lose any ability to make an informed decision about having sexual intercourse with [REDACTED]. In her own words, she "let him" begin, she made no indication that she did not want to—"he didn't know," and when she decided it should end she told him to stop. He did. These facts are dispositive.**

Further, these texts are important for what they reveal but they are also important when assessing [REDACTED] credibility and whether she was forthcoming during the course of the investigation. It is clear from this very candid exchange with [REDACTED] that the next morning [REDACTED] remembers consensually kissing [REDACTED] (i.e. "We made out") and that she initially consented to having sex with him (i.e. "I just let him start") that she, subjectively (at least the next day) did not want to have sex but, based on her actions, [REDACTED] would not have known (i.e. "Like he didn't know") and then he stopped when she said stop. Despite the critical information contained in these texts, [REDACTED] meets with investigators on January 14 and January 18, over two months after sending these texts, and makes allegations that are fundamentally at odds with the narrative version contained in the texts.

[REDACTED]

The evidence is clear, therefore, that before even reviewing [REDACTED] statement, [REDACTED] was not incapacitated. [REDACTED] statement makes it evident that [REDACTED] was an active partner in a consensual sexual encounter and, therefore, she was not incapacitated during any of their interactions. Also, almost every assertion [REDACTED] makes is corroborated by another witness, including [REDACTED].

⁹ It is clear that [REDACTED] instinctually understands that the reality of this encounter (and what should be the outcome in the case): **no one is to blame**. She writes, "You told him To stop and he did thank god/But don't be mad at yourself/You don't deserve to be mad at yourself. You did nothing wrong."

For example, [REDACTED] (like [REDACTED], [REDACTED] friends at [REDACTED], and [REDACTED]) observed no tell-tale signs of intoxication, let alone incapacitation. Like each of the above listed witnesses, [REDACTED] noted that [REDACTED] did not slur her speech. Like each of the above listed witnesses, [REDACTED] observed no issues with the way [REDACTED] walked; she did not stumble, fall, or trip. Further, once in his room, [REDACTED] had to step on a small box to then climb onto his bed. There is little doubt an incapacitated person (i.e. [REDACTED] in the Snapchat Video) could not perform this task. [REDACTED] did.

[REDACTED] also describes mutual kissing (**[REDACTED] concedes she remembers kissing after being shown the text where she states the next morning they were “making out”**) as well as the fact that each of them was grinding on the other as they lay in the bed (**[REDACTED] states that part gets “fuzzy”**). [REDACTED] states that at this point [REDACTED] tells him I know you want to do it.¹⁰ [REDACTED] says as this was unfolding [REDACTED] instructed him first to kiss her neck (**a fact [REDACTED] described in her second interview as “probably true” because she has said this before in consensual sex**). Further, there was no question that [REDACTED] was interested in an encounter that well exceeded “making out” as she arched her back in order that [REDACTED] could more easily remove her spandex shorts (**“[REDACTED] thinks she did lift her back so that he could pull her shorts off” and [REDACTED] acknowledged “she did not think she objected to taking her spandex off.”**)¹¹

As the encounter continued, it was [REDACTED] who instructed [REDACTED] to get a condom (**[REDACTED] stated that she vaguely remember some conversations about condoms but could not recall what was said.**) [REDACTED] had to leave the bed to retrieve a condom. [REDACTED] remained in his bed, waiting for him to return (**[REDACTED] confirmed that [REDACTED] might have stood up in the middle of the interactions (it was “[REDACTED]”) in order to get a condom.**)

A critical aspect of their encounter, both showing that she was not incapacitated as well as revealing this was a wholly consensual encounter, was the exchange the two had before having sex. Although [REDACTED] had retrieved the condom, he had not yet put it on, and [REDACTED] confronted him about this fact. The two then had a brief exchange about [REDACTED] not wanting to be, in essence, tricked into having unprotected sex (**[REDACTED] states she had no memory of this exchange**). The import of this exchange is obvious. First, [REDACTED] is acting with capacity as she clearly is well aware of what is going on to question [REDACTED] and confirm he is wearing a condom. Secondly, it unambiguously speaks to the consensual nature of the exchange because, in addition to all the other facts, [REDACTED] comment confirms she wants to have sex but equally wants it to be protected.

[REDACTED] testimony alone establishes that the sex that followed was consensual but it is corroborated by other evidence. In his interview, [REDACTED] also made it clear that when he spoke to [REDACTED], [REDACTED] told him that “[REDACTED] had told him that she remembered ‘blacking out’ and that the only thing she recalled specifically was asking [REDACTED] to get a

¹⁰ There is no question [REDACTED] has repeatedly stated that [REDACTED] used the phrase “Do it.” The issue has been raised as to his recounting of [REDACTED] saying this a second time before the penetration. [REDACTED] has made clear that he recalls she said “Do it” a second time. Further, during his interview, in real time, I showed the investigative team my notes that reflected this fact. Regardless, the fact that [REDACTED] said “Do it” at the inception of the encounter is not in dispute. This coupled with all the other facts referenced at length in this submission (most importantly the condom conversation) make it clear she consented to the encounter.

¹¹ Although, she simultaneously (and implausibly) claims, “I did not want to go further than making out.” The facts she concedes utterly undercut this claim.

condom.” [REDACTED] corroborated this by stating in his interview that “during their conversation outside [REDACTED],” [REDACTED] said “something about a condom,” but he did not remember what. Fortunately, [REDACTED] herself corroborated the truthfulness and accuracy about [REDACTED] account regarding the condom.

[REDACTED] makes a number of telling concessions about the condom during her conversation with [REDACTED] at [REDACTED]. For instance, she admitted that when [REDACTED] confronted her about their exchange about the condom, she said she was not blind (ie. meaning that she was able to tell that he was not wearing a condom). She then attempted to explain her statement about “the blind thing” as meaning that she had been aware that they were making out “and so may have said something about a condom.” [REDACTED] attempts to retract this explanation in her comments, writing that “I mean that despite being that drunk, it did not mean that my vision was blacked out; I could still see what was physically happening. I could see what was happening as in us making out, but at one point, acting on what was happening was where I was incapable of making decisions due to my incapacitation.” This statement is implausible (that she was able to proactively assert that she could see what was happening, discuss the condom with [REDACTED], but still be physically incapable of making decisions) and is not the most logical explanation for her words. The reality is that, as the sexual encounter was escalating (and after asking [REDACTED] if he had a condom), [REDACTED] then confronted [REDACTED] about whether the condom was in fact on. Understandably, [REDACTED] referenced this fact at [REDACTED] (as it objectively and conclusively reveals that the sex was consensual) and she angrily responded that she “was not blind” corroborating that she had, in fact, observed that he had not yet put on the condom. Her subsequent attempted retraction of this concession simply underscores how damaging these facts are to her allegations.

[REDACTED] next said that began to take [REDACTED] underwear off and [REDACTED] indicated she did not want them off. She then pulled them to the side (**[REDACTED] says that she has never done this before, however, she does not meaningfully refute this fact as “she cannot recall all the details, due to her level of intoxication...” [REDACTED] also adds that she kept her [REDACTED] on as “she was somewhat self-conscious.”**). As the two had sex [REDACTED] continued to give [REDACTED] instructions (as with the “kiss my neck” and “get a condom”). For instance, she told him, “It’s been a while, go slow.” [REDACTED] made it clear that “go slow” referred to the speed of the penetration. She also instructed him to “hold it there” referring to his penis as he kissed her neck. (**“[REDACTED] stated that she did not ‘really’ remember any specifics of the conversation during the sexual interaction (although she did not deny that there likely was some conversation...)”**).

[REDACTED] then suggested that she turn over to her stomach to which [REDACTED] stated that she did not want to as she feared [REDACTED] would “cum too fast.” (**“[REDACTED] acknowledged that the statement (about not “cumming” too fast) sounded “like something she might say,” but stated that she did not recall saying it.”**). After informing her he would not, she, on her own volition, turned over and the two continued to have sex. The two stopped having sex when [REDACTED] noted her back hurt. [REDACTED] respected her wish and the sexual encounter ended. (**In her text to [REDACTED], [REDACTED] stated: “And he stopped when I said stop....I just like let him start/Like he didn’t know..I didn’t want it at all/idk/I’m just mad.”**). [REDACTED] describes her departure from the room as unremarkable:

she did not appear upset and was not crying. And once again, this was the same observation from [REDACTED].

Therefore, a thorough review of [REDACTED] and [REDACTED] various statements show a remarkable amount of overlap. **In fact, there are really no points of divergence; instead there are parts of the encounter where [REDACTED] cannot rebut [REDACTED] statements because she claims no memory of that portion of the night.** It is critical to note that many of [REDACTED] concessions are, unto themselves, dispositive as to a finding of “not responsible.” [REDACTED] actually states she did not object to [REDACTED] taking off her spandex and facilitated the removal. She also concedes it was likely she told [REDACTED] not to “cum too quickly” and “there was some discussion about a condom.” It is not surprising that [REDACTED] states that “[REDACTED] was also worried that because she couldn’t remember what happened, she might have given [REDACTED] some ‘indication’ or done something to make him think that she wanted to have sex with him.” While not credible that this “worry” flowed from a lack of memory, it is perfectly understandable from these facts that [REDACTED] knows full well she presented as an active and engaged sexual partner.¹²

All of these facts independently support a finding of “not responsible.” Taken together, there is no question that this was a consensual encounter between two people acting with capacity.

TEXT MESSAGE EXCHANGE BETWEEN [REDACTED] AND [REDACTED]

The text message exchange between [REDACTED] and [REDACTED] utterly corroborate her friend’s descriptions of [REDACTED] (and [REDACTED] own description of herself) when she is drinking: she is impulsive and flirtatious. They also underscore another point: [REDACTED] was not incapacitated. The text messages make clear that she is intent on going to 90 and meeting [REDACTED]. It seems clear (especially in light of the fact that in the midst of deciding whether or not to file a complaint against [REDACTED] she also explored with [REDACTED] whether he might have a romantic interest in her) that she was interested in having a sexual encounter that evening and, at first, hoped it would be with [REDACTED]. The texts show someone who is not only acting with capacity but, quite frankly, is calculating.

Initially, [REDACTED] strategy of appealing to [REDACTED] is to tell him at 1:20 a.m., seemingly without any prior communication, that “I’m not okay/Deadass I’m terrified.” Not surprisingly, that dramatic text prompted a response from [REDACTED] who asked her what was wrong. [REDACTED] tells him that she is “alone.” Of course, the Evidence Binder makes clear that at 1:15 a.m., five minutes before being “terrified” and “alone,” she was in her own suite. For that matter, she very well could have sent that text while she was still inside of her suite. Regardless, she then made the decision to go to [REDACTED] “because she wanted to talk to him.” A review of all of the evidence in the Evidence Binder reveals she was not “terrified” but rather this claim is simply a ploy to have [REDACTED] interact with her.

The calculating nature of these texts reveal that not only is [REDACTED] not incapacitated at this time, but she fully understands the decisions she is making. For instance, she is wholly aware of the inherent awkwardness in reaching out to [REDACTED] knowing that her ex-boyfriend, [REDACTED], is his roommate. She is cognizant enough to recognize all of this and ask “is [REDACTED] up there??” And again, fully processing the

¹² Which is why her own (undeserved) self-critique immediately following this incident is not that she is a victim of an assault but rather that she is a “[REDACTED].”

awkward situation she is potentially creating, texts, “Bad plan but it’s happening.” While these decisions may reveal a forwardness and lowered inhibitions, they also starkly reveal that [REDACTED] was not incapacitated.

[REDACTED], however, is seemingly unable to get up to [REDACTED] floor and is told repeatedly by [REDACTED] that “she just has to chill out” and to “go home.” Once again, she tells [REDACTED] that she is “alone.” She is clearly at [REDACTED] at this point because she describes [REDACTED] as “handsy” and further states “bro I’m not Trynna be raped/That was aggressive but true” and then immediately attempts to confirm whether [REDACTED] is still in his suite. She then (two minutes before buying [REDACTED] food) claims that [REDACTED] “already tried to” sexually assault her. This is demonstrably absurd and false and is obviously yet another effort (as the “terrified and alone” angle did not work) to prompt a reaction/meeting with [REDACTED]. Even by her own claim, [REDACTED] simply grabbed [REDACTED] waist area and brought her closer to his body. He did not touch her breasts, buttocks, or vaginal area. Not only is this not “handsy” in any meaningful way, it hardly can be considered an attempted assault. Her comments to [REDACTED] about [REDACTED] are simply an ongoing effort to engage with [REDACTED] and clearly not an accurate reflection of what she was feeling.

Also, this is perhaps the first time in a sexual assault investigation that the “outcry” about a sexual assault i.e. “bro I’m not Trynna be raped” *preceded* the sexual assault. And of course, between the “I’m not Trynna be raped” and the actual intercourse (which to quote [REDACTED] text to [REDACTED] she “let him start” having sex with her) the following happened: [REDACTED] bought [REDACTED] food, walked with him to his suite, hung out with him in the common area, walked with him to his room, climbed on the step into his bed, remaining with him when he undressed, made out with him, asked him to get a condom, facilitated the removal of her spandex, and pulled her underwear to the side to facilitate the intercourse.

It is also worth pointing out that not only do these texts reflect calculated decision-making in the above-described manner, they are also largely devoid of any typos. In fact, on multiple occasions when she makes a typo she recognizes the error and corrects it (i.e. chicken=Chillen** and [REDACTED]=[REDACTED]***). This simply corroborates [REDACTED] assessment (from minutes earlier) that [REDACTED] was “functional” and also corroborates the five other individuals (and [REDACTED]) who during that same time period observed no indication that [REDACTED] was incapacitated, let alone, intoxicated to any significant degree.

Many of these facts individually warrant a finding of “not responsible.” A collective review of all of the evidence mandates such a finding. Candidly, a reasonable review of this case also supports the conclusion that [REDACTED] was genuinely upset about her encounter with [REDACTED]. Although, the testimony from [REDACTED] and [REDACTED] persuasively proves she did not appear upset while in the suite, in short order she was emotional and crying while interacting with [REDACTED]. Ironically, the reason she is presenting this way is not because she was incapacitated (or that she was forced in any way to have sex). She is upset because she understands that, despite the fact she likely would have preferred to be with [REDACTED] that evening, she presented to [REDACTED] as a completely willing

participant and she only belatedly informed him that she did not want to have sex with him; and it is [REDACTED] herself who makes her true motivation for crying clear.

[REDACTED] told [REDACTED] that “she had been ‘making out with’ a boy while she was drunk and was worried that she had flirted with him and ‘giving him signs’ and that they had sex while she was really drunk.” Similarly, to [REDACTED], [REDACTED] conceded “she was concerned that she didn’t remember many things and that she may have said something to [REDACTED] about being flirty or giving off the ‘wrong vibe.’” Further, when candid with the investigative team, she revealed words and conduct that inescapably gave the impression she wanted to have sex (i.e. facilitated the removal of her shorts/discussed a condom/probably told him not to “cum to quick”). And, again ironically, what likely added to her frustration was that when she asked [REDACTED] to stop he revealed himself to be precisely the kind of person who would be respectful of her wishes: he stopped.

And there can be no question [REDACTED] was upset with herself. In her text exchange with [REDACTED] she wrote, “I was just so upset that I let myself have that happen.” She confirms that she “let [REDACTED] fucking [REDACTED] fuck meeee” and continues, “I just like let him start/Like he didn’t know..I didn’t want it at all/Idk/I’m just mad.” Inevitably, there is a particular fact or piece of evidence in any investigation that speaks definitively to the core issue in the case. This text is one such piece of evidence. Alone, it mandates a “not responsible finding.” It, at the same time, addresses the fact that she was capable of making informed decisions (“I just let him start”) but it also explains why [REDACTED] believed she was consenting (“he didn’t know”) and why she was upset (“I didn’t want it at all”).

Finally, in another moment of candor, [REDACTED] relates her experience at counselling to [REDACTED]. [REDACTED] explains that [REDACTED] told her that while at counselling “everyone told her that she was raped.” Of course, the evidence also shows that [REDACTED] did not share her entire story with “everyone.” Regardless, and quite tellingly, [REDACTED] said that the situation was “messed up” **“and that ‘logically’ he may not have known.”** The reality is that the Code makes clear that if a reasonable person in [REDACTED] situation would not have known that 1) either she was incapacitated or 2) was not consenting to the behavior the student is not responsible for any Code violation. A full and thorough review of the Evidence Binder corroborates [REDACTED] own assessment: [REDACTED] “logically” would have every reason to believe that [REDACTED] was an active and willing partner who was not incapacitated due to alcohol.

Respectfully,

Evan Krutoy and [REDACTED]